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NO. 82-282

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Thomas C. McCain and William Spencer, individually and on behalf of all those similarly situated,

Appellants,

vs.

Charles E. Lybrand, Gene Huiet, Henry M. Herlong, Roy A. Harling, and W. T. Timmerman, individually and as members of the County Council of Edgefield County; Norman Dorn, John S. Edwards, and Richard A. Beals, individually and as members of the Board of Election Commissioners of Edgefield County, S.C.; and J. M. Pendarvis, individually and as President of the Executive Committee of the Democratic Party of Edgefield County,

Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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Thomas C. McCain and William Spencer, individually and on behalf of all those similarly situated,

Appellants,

vs.

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Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Rules of the Supreme Court of the United States, the appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge United States District Court for the District of South Carolina on the grounds that it is manifest that the questions on which the

decision of the cause depends are so unsubstantial as not to need further argument and that there is no conflict in decisions.

OPINION BELOW

The order of the three-judge district court is set forth in the appellants' jurisdictional statement. Jurisdictional Statement, App. at 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement. Jurisdictional Statement at 1.

STATUTE INVOLVED

Pertinent provisions of Section 5 of the Voting Rights Act of 1965 [42 U.S.C. § 1973c] are set forth in the appellants' jurisdictional statement. Jurisdictional Statement, App. at 25a.

STATEMENT

This appeal is from the order of the three-judge district court dated May 10, 1982, holding that the current method of electing the members of the Edgefield County Council has not been put into effect in violation of Section 5 of the Voting Rights Act of 1965 and denying the appellants' request for injunctive relief. Jurisdictional Statement, App. at 1a.

The appellants are two black voters of Edgefield County, South Carolina, and the defendants are the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners and the president of the executive committee of the Edgefield County Democratic Party.

The appellants filed their original complaint in this action on February 26, 1974, alleging, first, that the at-large method of electing the Edgefield County Council diluted black voting strength in violation of the First, Thirteenth, Fourteenth and Fifteenth

Amendments and 42 U.S.C. §§ 1971, 1973 and 1983 and, second, that the Edgefield County Council residency districts were malapportioned. On May 16, 1974, the district court granted summary judgment to the appellants on their malapportionment claim. McCain v. Lybrand, 376 F.Supp. 304 (D.S.C. 1974). The Fourth Circuit Court of Appeals, however, reversed sub nom. Lytle v. Commissioners of Election, 509 F.2d 1049 (4th Cir. 1974), and this Court subsequently denied a petition for a writ of certiorari. McCain v. Lybrand, 419 U.S. 1032 (1974).

The dilution issue was tried on November 24 and 25, 1975, and on April 17, 1980, the district court entered an order finding that the at-large method of election infringed on the appellants' rights to due process and equal protection of the laws in connection with their voting rights. On April 25, 1980, the appellees moved to alter, amend or vacate the judgment on the basis of the intervening decision in City of Mobile v. Bolden, 466 U.S.

55 (1980). Their motion was granted on August 11, 1980, with leave to introduce additional evidence on the issue of intent to discriminate. Before that hearing could be conducted, however, the appellants were allowed to amend their 1974 complaint to add their claims under Section 5 of the 1965 Voting Rights Act, which necessitated the convening of the three-judge district court. The "intent" hearing remains pending before the district court, the appellants having moved to reinstate the April 17, 1980, order on the basis of Rogers v. Lodge, 50 U.S.L.W. 5041 (U.S. July 1st, 1982).

On and prior to November 1, 1964, Edgefield County was governed by a board of county commissioners, consisting of an elected supervisor and two appointed commissioners. On June 1, 1966, the South Carolina General Assembly enacted Act No. 1104 creating the Edgefield County Council. It consisted of three members, with one member elected from the county at-large from each of three designated

residency districts. Although Act No. 1104 of 1966 was subject to the pre-clearance provisions of Section 5, it was neither submitted to the United States Department of Justice nor judicially reviewed by the United States District Court for the District of Columbia.

Act No. 1104 of 1966 was amended by Act No. 521 of 1971 which increased the number of Edgefield County Council members from three to five and, accordingly, added two more residency districts. Act No. 521 of 1971 was submitted to the United States Attorney General for pre-clearance on September 24, 1971, and the Attorney General interposed no objection to its provisions.

Then, in 1975, pursuant to Article VIII of the South Carolina Constitution, the General Assembly of South Carolina enacted Act No. 283, the "home rule" legislation, now codified as Sections 4-9-10 et seq. of the 1976 Code of Laws of South Carolina. Act No. 283 authorized all South Carolina counties

to select by referendum one of five forms of county government before July 1, 1976. If no referendum had been held by then, the county automatically had as of that date the form of government, including method of election, "most nearly corresponding to the form in effect immediately prior to that date" [§ 4-9-10(b), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended], which, in the case of Edgefield County, the General Assembly determined to be the council-administrator form. Edgefield did not hold a referendum by July 1, 1976, and so, as of that date, it had the council-administrator form of county government. The method of election remained that prescribed by Act No. 521 of 1971, which had theretofore been pre-cleared pursuant to Section 5 of the Voting Rights Act. The home rule legislation itself was pre-cleared by the United States Attorney General on August 28, 1975.

On June 21, 1976, the Edgefield County

Council implemented the provisions of the "home rule" legislation by enacting an ordinance and resolution formally adopting the council-administrator form of government and retaining the method of election prescribed by Act No. 521 of 1971. The ordinance was not submitted for Section 5 preclearance and, on August 3, 1978, the United States Department of Justice wrote to Edgefield County requesting that the 1976 ordinance be submitted. That Department wrote again on September 20, 1978, renewing its request and, by letter dated September 29, 1978, Edgefield County's implementation of "home rule" was submitted for pre-clearance. After requesting additional information, the United States Attorney General interposed an objection to Edgefield County's submission on February 8, 1979. Subsequently, in Woods v. Hamilton, 473 F.Supp. 641 (D.S.C. 1979), a three-judge district court held that the preclearance of the "home rule" legislation effectively pre-cleared a county which had held

no referendum on form of government and had retained its pre-home rule method of election. Nevertheless, in view of the Attorney General's outstanding objection, the appellees pursued the alternative of the single-member district method of election and appointed a citizens advisory committee to propose single-member districts. When the appellants moved to enjoin the 1980 elections and the district court issued its subsequently-vacated April 17, 1980, order, however, the plans were held in abeyance until a definitive ruling by the district court on the validity of the at-large method of election.

ARGUMENT

I. There is no substantial question presented.

A. Act No. 1104 of 1966 and the 1971 amendment thereto.

The three-judge district court rejected the appellants' argument that Edgefield County's at-large method of election has never been pre-cleared, declaring:

> ... Plaintiffs' arguments would require this court to find that the Attorney General did not consider the effect of at-large, as opposed to district, voting when he elected not to object to 1971 Act No. 521. Analysis of both the facts before the Attorney General and his requests for additional information do not bear out plaintiffs' argument. Jurisdictional Statement, App. at 10a.

The lower court discussed at length the exchange of correspondence between the United States Department of Justice and public officials in South Carolina in 1971 when the United States Attorney General had before him for pre-clearance the 1971 amendment to Act No. 1104 of 1966. Id. at 10a - 12a. After examining the correspondence, the lower court concluded that the "Justice Department's review of Act No. 521 [of 1971] encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966" and that "any defect in the 1966 Act No. 1104

is moot." Id. at 12a.

The lower court also analyzed the language of the two acts and concluded that that language "compels rejection of plaintiffs' contention that failure to submit Act No. 1104 dooms the present method of electing the Edgefield County Council." Id. at 13a. Sections 1 and 3 of the 1966 legislation had established an at-large with residency districts method of election for a three-member council. Stipulations, No. 4 and Exhibit B. The 1971 amendment amended Sections 1 and 3 as follows:

> SECTION 1. Edgefield County divided into districts. - Section 1 of Act 1104 of 1966 is amended by striking it out and inserting:
>
> 'Section 1. For the purposes of elections as provided herein and such other elections and purposes as may be provided by law, Edgefield County is divided into five districts as follows:
>
> District No. 1 shall be composed of Johnston No. 1, Johnston No. 2 and Long Branch precincts.
>
> District No. 2....
>
> District No. 3....
>
> District No. 4....
>
> District No. 5....'

> SECTION 2. Edgefield County Council.- Section 3 of Act 1104 of 1966, as amended, is further amended by striking it out and inserting:
>
> 'Section 3. There is hereby created the Edgefield County Council (council) which shall be composed of five members who shall be elected in each general election to serve for terms of two years and until their successors are elected and qualify. One member with the largest plurality shall be elected by the county at large from each of the five districts of the county....' Stipulations, No. 6 and Exhibit C. [Emphasis added.]

The language of the 1971 Act provides completely for a method of electing the Edgefield County Council members. It stands entirely on its own, as if the earlier legislation had been repealed (which, in effect, it had been) or never enacted at all. Edgefield County's present method of election, then, which is unchanged by the implementation of "home rule" in that county [infra at 15-16], is that provided for by Act No. 521 of 1971 which has been precleared by the United States Department of Justice.

Moreover, the lower court's opinion does

not usurp the Section 5 function reserved to the United States Attorney General and to the District Court for the District of Columbia nor does it conflict with controlling decisions of this Court. This action is one to determine the applicability of Section 5 of the Voting Rights Act, not to review the United States Attorney General's exercise of discretion. The appellants themselves recognize that the inquiry of a local three-judge court extends to a coverage question under Section 5 [Jurisdictional Statement at 14], which is precisely the focus of the lower court's inquiry. The Justice Department's assertion that the 1966 legislation has not been pre-cleared is reviewable because that assertion necessarily relates to the applicability of the provisions of Section 5 and to the authority or jurisdiction of the Justice Department to require pre-clearance, matters which, this Court has repeatedly held, are proper for a local three-judge district court

to review. See, e.g., Garcia v. Uvalde County, 455 F.Supp. 101 (1978), aff'd 439 U.S. 1059 (1979); Georgia v. United States, 411 U.S. 526 (1973); see also, Woods v. Hamilton, 473 F.Supp. 641 (D.S.C. 1979). The appellants' reliance on Blanding v. DuBose, 509 F.Supp. 1334 (D.S.C. 1981), rev'd 50 U.S.L.W. 3543 (U.S. January 12, 1982), is misplaced because there the United States Attorney General had objected to a Section 5 change and the lower court reversed that determination. Here, there is no outstanding objection to the 1966 enactment; instead, the Justice Department has determined that the 1966 enactment is subject to pre-clearance and, as already noted, that determination can be reviewed and reversed by a local three-judge district court. 1/

1/ Moreover, in Blanding v. DuBose, Sumter County, South Carolina, did not nave a pre-"home rule" method of election which had already been pre-cleared under Section 5 and which was retained unchanged pursuant to the "home rule" legislation as is the case in Edgefield County.

B. The June 21, 1976, ordinance and resolution.

The lower court also rejected the appellants' argument that the June 21, 1976, ordinance and resolution implementing "home rule" in Edgefield County constitute changes subject to Section 5 pre-clearance, [2/] relying primarily on Woods v. Hamilton, supra. Jurisdictional Statement, App. at 16a-18a. In Woods, a three-judge district court ruled that a South Carolina

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2/ Pursuant to provisions of the "home rule" legislation, each county council in South Carolina was required to formally adopt by resolution the appropriate form of government, whether pre-assigned or selected by referendum, and to provide by ordinance for the election of county council members in accordance with the appropriate method of election, whether provided for by pre-"home rule" legislation and retained or selected by referendum. § 4-9-10(a), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Although the appellants agree that the provisions of the "home rule" legislation as construed by the South Carolina Supreme Court in Infinger v. Edwards, 234 S.E.2d 214 (1977), continue in Edgefield County the exact method of election prescribed by Act No. 521 of 1971 [Stipulations, No. 27], they argue that the implementing ordinance and resolution constitute changes in voting required to be pre-cleared.

county which merely adopts a resolution and an ordinance implementing "home rule" in that county while maintaining precisely the method of election for county council members which was in effect before the enactment of the "home rule" legislation does not effect a change within the meaning of Section 5 of the 1965 Voting Rights Act. In granting summary judgment to the defendants therein, that court declared:

> Plaintiffs' final argument concerning the implementation of Home Rule in Charleston County is that, even if the transfer of powers to Charleston County were precleared, and even if both old and new county government were identical, the resolution and ordinances passed by County Council implementing Home Rule constituted "changes." This argument fails for two reasons.
>
> First, it is doubtful that the ministerial act of passing adoptive ordinances, such as done here, was ever intended by Congress to be a "change" when such adoptive ordinances merely implemented statutes which had previously been precleared. Secondly, even if Charleston County was required to submit the implementation ordinances to the Attorney General -- (which this court has determined was not necessary) -- .... 473 F.Supp. at 647. [Emphasis added.]

Woods also disposed of the argument that the assumption of new powers at the county level represents a "change" within the meaning of Section 5 of the Voting Rights Act by holding that the Justice Department's approval of the "home rule" legislation in general on August 28, 1975, constitutes pre-clearance. Id. at 644-5. With respect to the contention that the decision not to conduct a referendum constitutes a "change," the court decided:

> 7 The government plaintiff also takes the position that the choice itself under the Home Rule Act not to conduct a referendum, and the consequent assumption of an assigned form of government and method of election under S.C. Code § 4-9-10(b), constitutes a change in the form of government and method of election, even though the form and method of election of the "new" government are the same as the "old" government. This court disagrees. The simple fact is that under the particular situation existing in Charleston County, the "old " and "new" councils are elected in exactly the same way and have exactly the same composition. As the Supreme Court of South Carolina noted in Infinger v. Edwards, 268 S.C. 375, 234 S.E.2d 214 (1977),

> the two Charleston County Councils exhibit "absolute identity" in relation to form of government and method of election. Therefore, this court holds that there has been no "change" as to these two factors. Id. at 644.

For the foregoing reasons, the appellees submit that there is no substantial question presented by the appellants which merits further review by this Court because the lower court's order is in accord with decisions of this Court.

II. There is no conflict in decisions.

The appellants contend that the lower court's order is in conflict with the opinion of the three-judge district court for the District of Columbia in Horry County v. United States, 449 F.Supp. 990 (D.D.C. 1978). Jurisdictional Statement at 20-22. That decision is easily distinguishable from the lower court's order, however, because in Horry County, the pre-"home rule" governing body in Horry County was appointed, not elected,

and accordingly the United States Department of Justice had never reviewed Horry County prior to the implementation of "home rule." When Horry County changed from an appointed governing body to an elected one pursuant to the "home rule" provisions, there is no question but that that change was one requiring Section 5 pre-clearance. But that situation does not exist in Edgefield County which had an elected governing body (which had been pre-cleared) before "home rule" and continued that elected governing body after "home rule." The appellant also argues that the Horry County decision declared that the reallocation of powers among different elected officials effected by the "home rule" legislation constitutes a Section 5 change. But the Horry County court declared that to be "[a]n alternative reason" for subjecting the new method of selecting the Horry County governing body to Section 5 pre-clearance. 449 F.Supp. at 995. Its declaration as to that issue therefore

amounts to mere dicta and does not result in a conflict with the lower court's ruling or with the Woods v. Hamilton decision. 3/

3/ The Woods court discussed the Horry County's declaration as follows:

> The issue of whether a transfer of power alone constitutes a 'change' triggering § 5 has never been resolved by the United States Supreme Court and, so far as this court can determine, this theory has only been accepted as valid by one court, the United States District Court for the District of Columbia, in Horry County v. United States, 449 F.Supp. 990 (1978). However, even in the Horry County case, the acceptance of this theory was characterized as an 'alternate reason' and, thus, such acceptance was not essential to the decision in the case. At oral argument, the attorney for the United States conceded that the issue is difficult, and he expressed his inability to draw a line between a reallocation of governmental powers that would constitute a 'change' affecting voting, and a reallocation which would not constitute such a 'change.' ... the court is of the opinion that, even if the transfer of power from the legislative delegation to the county council was a triggering 'change,' it was a 'change' which was precleared by the Attorney General of the United States by his actions in connection with submission of the Home Rule Act and Charleston County ordinances.... 473 F.Supp. at 644.

CONCLUSION

The appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and that there is no conflict in decisions and, therefore, respectfully move this Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for the Appellees and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the Appellees' Motion to Dismiss or Affirm were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage pre-paid, and addressed to the counsel of record for the Appellants as follows: LAUGHLIN McDONALD, ESQUIRE, 52 Fairlie Street, N.W., Atlanta, Georgia 30303.

This 10th day of September, 1982.

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